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The wrong kind of 'interesting'

The investment climate in Latin America recalls a certain Chinese proverb.

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IT HAS BEEN almost a year since *The National Law Journal* ran an article surveying the wave of nationalizations and expropriations pouring over much of Latin America. Michael Goldberg and Dev Krishan, "Resource Rich Nations are Reshuffling the Deck," NLJ, Aug. 7, 2006, at 16. It is a good time to update these developments and take stock of their legal implications.

In Venezuela, President Hugo Chávez was re-elected in December 2006 and on Jan. 31, 2007, the Venezuelan National Assembly unanimously adopted an enabling law giving him the power to rule by decree for 18 months in most sectors of the economy. The year 2007 has seen a large-scale restructuring of the energy and telecommunications sectors with a sweeping impact on foreign investors.

As far back as 2005, the Venezuelan government had announced it would "renegotiate" contracts with foreign companies operating oil fields in the country to confer at least a 60% stake to Petróleos de Venezuela S.A. (PDVSA)—Venezuela's state-owned oil company—in respect of concessions in the Orinoco Belt. Compulsory renegotiations were in full in swing in 2007 and included increases in tax and royalty rates as well as domestic, rather than international, arbitration as the mechanism to resolve disputes. The government's non-negotiable demands are said to include contractual waivers of rights to previous agreements and claims in respect to the nationalization process. Peter Millard, "Venezuela Closes In On Orinoco, Settles Up With Total," Dow Jones Int'l News, March 5, 2007.

Nationalizations have led to 'renegotiations.'

The talks between the government of Venezuela and foreign investors often have resulted in the latter "agreeing" to reduce or sell their stake in the country. Earlier this year, Electricidad de Caracas, the electricity provider for the Caracas metropolitan area, and Compañía Anónima Nacional Teléfonos de Venezuela, the nation's largest telecommunications company, became state-owned again. "Venezuelan government buys 93 percent stake in AES as part of nationalization move," FinancialWire, May 11, 2007, available at www.investrend.com/articles/article.asp?analyst-Id=0&id=55212&topicId=160&level=160; "Venezuelan government acquires controlling stake in CANTV," Int'l Telecomm. Intelligence, May 11, 2007.

BP PLC, Total S.A., Chevron Corp. and Statoil ASA also have agreed to hand over the control of operations in oil crude projects. ConocoPhilips and Exxon Mobil Corp. are involved in negotiations with the government of Venezuela, and could commence arbitration proceedings if the discussions fall apart. Damon Vis-Dunbar, "Venezuela signs contentious new contracts with foreign oil companies," Investment Treaty News, April 11, 2006, at 4; available at www.iisd.org/pdf/2006/itn_april11_2006.pdf.

At least one claim involving a bilateral investment treaty (BIT) was filed by a Dutch subsidiary of Eni SpA in February 2007 with the International Centre for Settlement of Investment Disputes (ICSID) in respect of "renegotiations" concerning the Dación oil field. Eni is still negotiating with PDVSA the transformation of operations in the Corocoro oil field into a "mixed enterprise" regime. It is an open legal question

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whether such forced negotiations and the resulting professedly consensual deals are in fact simply disguised expropriations for which compensation could be sought. *Eni Dación B.V. v. Bolivarian Republic of Venezuela* (No. ARB/07/4) was registered with the ICSID secretariat on Feb. 6, 2007. See www.worldbank.org/icsid/cases/pending.htm.

In Bolivia, President Evo Morales ran in the 2005 elections on promises to bring the entire natural resource sector under state control. In May 2006, military units and government engineers physically occupied energy installations. In February 2007, the government ordered the confiscation of the nation's only operating tin smelter, owned by the Swiss multinational resources company Glencore International A.G. It threatened to (but eventually did not) terminate contract negotiations with the Indian conglomerate Jindal Steel and Power, the winner of a concession to mine the massive "El Mutún" iron ore deposits. The ownership of the country's largest tin mine remains at issue, and a July 2007 workers' strike was ended only with the government's commitment to nationalize both the mine and its production. The government also has targeted the telecommunications and transportation sectors. See "Bolivian miners, government reach agreement, strike ends," BBC Monitoring Latin America—Political, July 14, 2007.

Treaty provisions appear to be inconsistent.

In May 2007, Bolivia was the first—and thus far the only—country to implement the intention of the heads of state of Bolivia, Venezuela, Nicaragua and Cuba at the "Bolivarian Alternative for the Americas" to withdraw from ICSID and other international institutions. The World Bank announced that it received on May 2, 2007, Bolivia's notice of withdrawal from the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, known as the ICSID Convention, an international treaty on the settlement of investment disputes ratified by some 150 countries. Damon Vis-Dunbar et al., "Bolivia notifies World Bank of withdrawal from ICSID, pursues BIT revisions," Investment Treaty News, May 9, 2007, available at http://www.iisd.org/pdf/2007/itn_may9_2007.pdf.

In Ecuador, the government of Rafael Correa has been a source of concern for foreign investors and the international financial community since his election as president in November 2006. Ecuador has terminated a BIT with the United States, expelled representatives of both the World Bank and IMF from their local offices and threatened to default on its $11 billion in overseas debt. Ecuador has issued conflicting reports on its intentions for managing its overseas debt and has committed itself as a founding member of Chávez's proposed Bank of the South. "Ecuador Won't Renew Investment Agreement with U.S.—Foreign Min," Wall St. J. Online; May 7, 2007; "Ecuador 'expels World Bank envoy,' " BBC News Online, April 26, 2007, available at http://news.bbc.co.uk/2/hi/americas/6598027.stm; Christopher Swann, "Chávez exploits oil wealth to push IMF out of Latin America," Int'l Herald Trib., March 2, 2007; see Matthew Cowley, "Venezuelan Offensive To Garner Support For Bank Of The South," Dow Jones Commodities Service, March 19, 2007.

Ecuador faces at least five publicly announced ICSID arbitrations brought under the auspices of the now-terminated U.S.-Ecuador BIT. See, e.g., *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11.

As noted, the World Bank announced that on May 2 it had received Bolivia's written notice of withdrawal from the ICSID Convention. Vis-Dunbar, supra. There are no fewer than a dozen BITs in force between Bolivia and other countries, all of which expressly contemplate the ICSID arbitration from which Bolivia seeks to extricate itself. See www.worldbank.org/icsid/treaties/bolivia.htm.

Defining 'consent'

The situation requires a closer look at what is meant by "consent" to ICSID jurisdiction. Traditionally, a BIT containing an ICSID arbitration clause is regarded as an "offer" by the host state to submit investment disputes to that forum, which investors "accept" (and thereby consent to) by instituting ICSID arbitration proceedings. A host nation may withdraw from the ICSID Convention under its Article 71, which provides that a withdrawal takes effect six months after receipt by the World Bank of written notice. In Bolivia's case, withdrawal would take effect on Nov. 3, 2007.

This means that until Nov. 3, Bolivia remains a "Contracting State" under ICSID; therefore, claims brought by nationals of another contracting state before that date arguably would still enjoy the full benefits of ICSID jurisdiction, despite Bolivia's announced withdrawal. According to Article 25 of the ICSID Convention, "no party may withdraw its consent [to ICSID jurisdiction] unilaterally" once consent by both sides has been given.

Article 72, however, provides that a withdrawal notice "shall not affect the rights and obligations under this Convention of that State [i.e. the withdrawing state] or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of [ICSID]…given by one of them before such notice was received by the depositary," not the date on which the withdrawal takes effect. Accordingly, one of the convention's leading commentators has suggested that claims filed after the receipt by the World Bank of a contracting state's denunciation, including those claims filed before the denunciation becomes effective (i.e., before Nov. 3), cannot benefit from ICSID jurisdiction. C. Schreuer, The ICSID Convention: A Commentary, n.4 Art. 72 (2001). This view inauspiciously renders the six-month delay in Article 72 meaningless. This being the first ICSID denunciation, there are no authorities or precedents on the interplay between Articles 71 and 72 in the withdrawal

context. No doubt much ink will be spilled on this subject in the near future.

As concerns claims filed against Bolivia after Nov. 3, they certainly would face some heavy odds. It could be argued that claims filed after Nov. 3 but based on events before that time (i.e. while Bolivia remained a contracting state) could still benefit from ICSID jurisdiction. However, this runs into the plain reading of Article 25(1) of the convention, which expressly extends ICSID jurisdiction only to disputes "between a Contracting State… and a national of another Contracting State." Bolivia arguably ceases to be a "Contracting State" after Nov. 3.

Other arbitral arrangements, however, may still be available, as some BITs contemplate arbitrations under the aegis of the Permanent Court of Arbitration, the Stockholm Chamber of Commerce, the International Chamber of Commerce (ICC) or ad hoc arbitration conducted under the Arbitration Rules of the United Nations Commission on International Trade Law. Schreuer, supra, n.125, Art. 25. But the question of "surviving" ICSID jurisdiction may be influenced by terms of the particular BITs between the host country and the investor's state. See Emmanuel Gaillard, "International Arbitration Law," N.Y.L.J., June 26, 2007, at 3.

What about the BITs?

ICSID and BITs are often referred to in the same breath, as if they covered the same territory. But they are distinctly different concepts. ICSID is an arbitral mechanism regulated by a convention, while BITs are treaties that offer investors of designated countries certain substantive rights and protections, and often include and reflect the consent of the host nation to participate in ICSID arbitration under some circumstances. Indeed, the ICSID withdrawal mechanism discussed above makes no reference to BITs, most of which were not in force when the ICSID Convention was put in place.

If a state withdraws from the ICSID Convention without also withdrawing from the BIT designating ICSID as a forum to arbitrate disputes, as Bolivia seems to have done, this BIT arguably still constitutes a valid offer to arbitrate at ICSID, and an investor of the signatory state could validly accept this offer. In other words, a BIT designating ICSID as an arbitral mechanism constitutes consent to ICSID jurisdiction solely for the investors of the BIT's co-signatory state, and this consent arguably could be eliminated only by withdrawing from the BIT in question. There is no ICSID jurisdiction without consent, but consent can be found outside of the ICSID Convention in BITs, contractual arrangements and domestic statutes of the host state. Thus, it would make little sense for ICSID jurisdiction to end when the consent to such jurisdiction (in a BIT or elsewhere) remains in force. This remains unexplored legal territory.

What if a BIT signifying consent to ICSID jurisdiction, by its terms, contains survival provisions that go well beyond the six months provided in Article 71 of the ICSID Convention? For example, Article XII(2) in the Spain-Venezuela BIT contains a survival of investment protections (including arbitration rights) for a full 10 years after termination of the BIT. See www.unctad.org/sections/dite/iia/docs /bits/spain_venezuela_sp.pdf. Other BITs have even longer survival periods. For example, the Netherlands-Venezuela BIT contains a provision in Article 14(3) for 15 years of protection after the BIT is terminated. See www.unctad.org/sections/dite/iia/docs/bits/netherlands_venezuela.pdf. What if the BIT contains a most-favored-nation clause that survives the BIT's termination and incorporates rights in other treaties that the host state has not chosen to withdraw from or which, in turn, might have long survival periods? Would a host state's consent to ICSID jurisdiction remain in effect for the full survival term of the BIT (or the most-favored BIT), despite compliance with the denunciation provisions in the ICSID Convention?

Article 72 of the ICSID Convention, quoted above, provides expressly that a withdrawal notice shall not affect the rights and obligations under the ICSID Convention of the withdrawing state arising out of consent to the jurisdiction of ICSID given before the withdrawal notice was received. It can certainly be argued that the surviving BIT reflects "consent" to ICSID jurisdiction "given" before the host state's withdrawal from the ICSID Convention. Such consent may arguably remain in effect for the full duration of the surviving BIT—10, 15, 20 or more years after withdrawal from the BIT, not just six months after withdrawal from ICSID. Withdrawal from the ICSID Convention under these circumstances might only be prospective and solely as to future consents to arbitration. All this is also terra incognita.

What about ICSID claims against states, like Venezuela, that have threatened to withdraw but have not formally done so yet? Not surprisingly, these are the claims most likely to continue enjoying ICSID jurisdiction, even if a denunciation is filed with the World Bank after the claim is brought. The plain text of Article 25(1) confers irrevocable ICSID jurisdiction, no matter what unilateral steps the state takes to withdraw thereafter. In other words, if consent to ICSID jurisdiction was perfected before denunciation, it cannot unilaterally be withdrawn. Schreuer, supra, n.2 Art. 72.

There may never be agreement whether "May you live in interesting times" is really a Chinese proverb, or even a curse or a blessing. As applied these days to international investment law, it is certainly is both. This article offers some thoughts on how some of those issues may be approached, but no doubt a updated version could be written in one year's time with some of the blanks filled in. These are indeed interesting times. NLJ

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